

89-1519

Supreme Court, U.S.
FILED

MAR 20 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ALAN WINTERBOURNE
Propria Persona

Petitioner

vs.

WORKERS' COMPENSATION APPEALS BOARD (WCAB);
VENTURA COUNTY COMMUNITY COLLEGE DISTRICT ;
ILA WINTERBOURNE

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Alan Winterbourne
684 Milton Avenue
Ventura, CA 93003
(805) 642-1283
Condensed Ver. R.33.1C



QUESTIONS PRESENTED

Does the California State Agency:
WORKERS' COMPENSATION APPEALS BOARD,
referred to as WCAB have authority in every
case to join an involuntary Plaintiff in a
stress related WCAB case to determine and
limit liability and damages of an employer
from possible future litigation when the
process in and of itself increases
litigations, and stress on parties trying
to not be involved while parties also try
to not be legally forced to release or sue
a possible guilty party because of ones
emotional and financial composure brought
about by ones father's stress related death
when not absolutely necessary?

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FEDERAL COURT OPINIONS

The court of Appeals for the Ninth Circuit dismissed reviewing case 89-56048 for lack of jurisdiction pursuant to Cal. Labor Code 5955 (APPENDIX A), after dismissal of Petition for Writ of Review to be unjoined from the order of United States District Court Central Division (APPENDIX B) ruled lack of subject matter pursuant to Federal Rules of Civil Procedure Rule 12b.

JURISDICTION

Jurisdiction is claimed under Title 28 USC sec. 1331 Federal Question, Constitutional amendments 1,4,5,14, and Federal Rule of Civil Procedure 19(a) on the joining of and involuntary plaintiff.

STATEMENT OF THE CASE

On July 12, 1984 my father William B. Winterbourne died after ingesting Potassium Cyanide due to work related stress. On August 7, 1984 my mother filed an WCAB application for death benefits. In the Spring of 1987 my mother Ila Winterbourne said I must sign a paper releasing Ventura College of liability with respect to my father's death. After this notice I notified parties involved about the mistake of including me in the case and of my nonparticipation status, and that I could not determine liability of Ventura College or release them of liability directly or indirectly. A long drawn out legal proceeding then occurred. The final judgment of the United States Appeals Court left no other avenues of Review/Appeal.

REASONS FOR GRANTING WRIT

I claim under the Constitution, Federal, and State laws and jurisdiction the right and privilege to not be forced by any agency whether State or Federal to be required to sue, or release a party of liability where my financial and emotional composure could be harmed, which would relinquish rights guaranteed all United States citizens. Under the duality clause a citizen can bring a civil and a WCAB suit while some states restrict civil cases in place of WCAB suits, California does not. The damages suffered as mentioned in the California Supreme Court case and Reply, Writ of Review S008879 far exceeds the amount allowable by WCAB code requirements. WCAB Title 8 Sec 10364 requirement on determining liability creates additional stress and litigation which is not needed.

CONCLUSION

I request of the highest court in the land to unjoin me from my mothers' case, and not be required to sue a party or be barred from future litigation, just because a party feels that liability or amount of damages in all cases must be determined when not absolutely necessary.

Wherefore Petitioner pleads for relief:

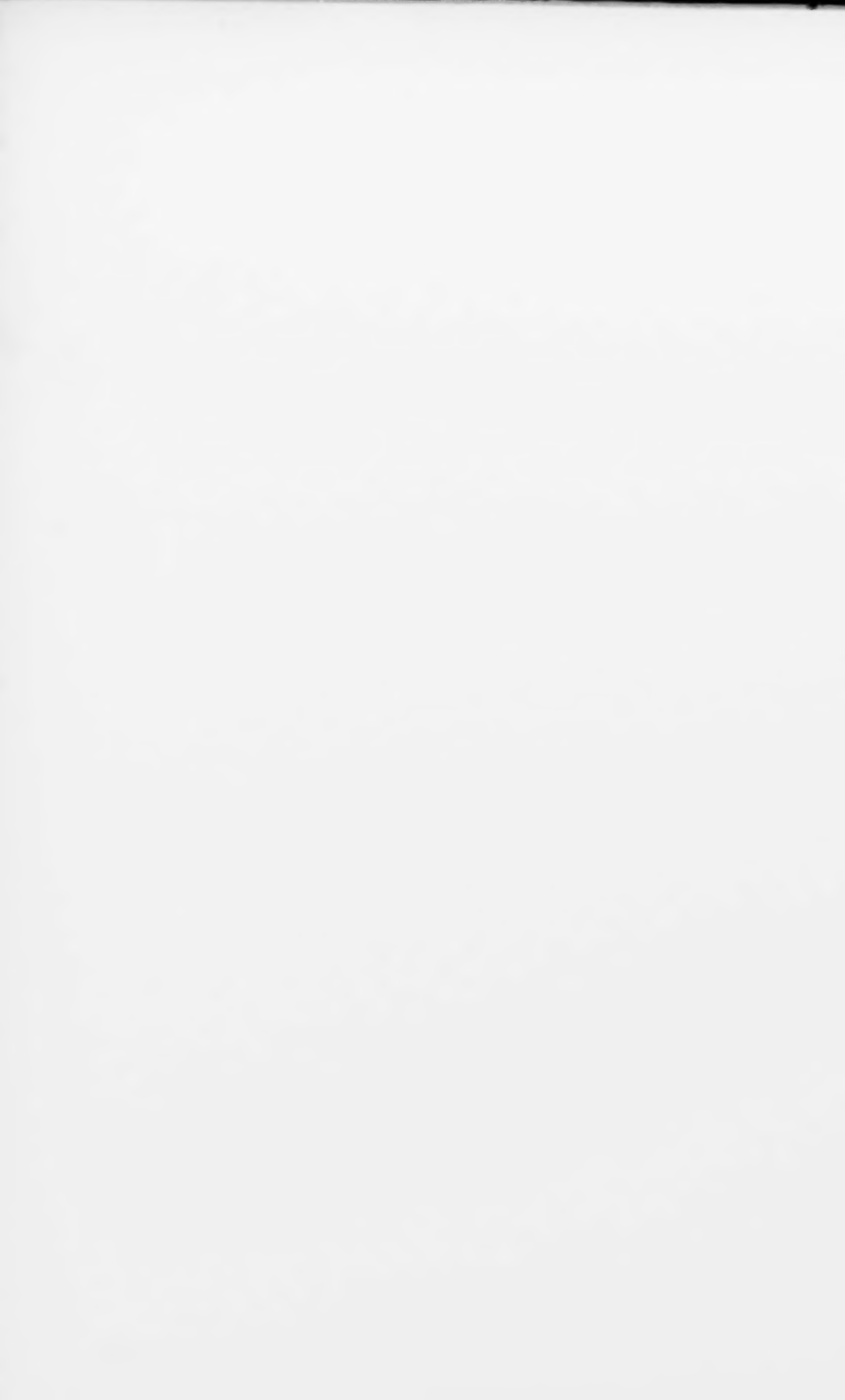
1. That a WRIT OF CERTIORARI be issued commanding WCAB to certify fully to this court.
2. That following such inquire determination by this court it be ordered adjudged and decreed that the decisions made by lower courts and agencies be annulled, vacated and set aside.
3. That the petitioner be granted such other and further relief as may be proper and just as in the premise.

Respectfully Submitted,

Alan Winterbourne

Dated March 19, 1990
Condensed March 26, 1990

Alan Winterbourne



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 21 1989

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

ALAN WINTERBOURNE

No. 89-56048

Plaintiff-Appellant, DC# CV-89-1887-RB
Central California

vs.

WORKERS' COMPENSATION APPEALS BOARD,)
et al.,) Order
Defendants-Appellees.)
_____)

Before: POOLE, NELSON, and LEAVY, Cir. Judges

The unopposed motion to dismiss this
appeal for lack of jurisdiction is granted.
See Cal. Labor Code sec 5955. Appellees'
motion for sanctions on appeal is denied.

MoCal 12/19/89

sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure came on regularly for hearing before this court on August 14, 1989 in Department 17, the Honorable Robert C. Bonner presiding.

Margaret Daley Ludington of Grancell, Lebovitz, Strander, Marx and Greenberg appeared as attorney on behalf of the moving party, Respondent-Defendant VENTURA COUNTY COMMUNITY COLLEGE DISTRICT; Lawrence Silver of Goldschmid, Silver and Spindel appeared as attorney for respondent-Defendant, ILA WINTERBOURNE. Petitioner-Plaintiff, ALAN WINTERBOURNE appeared in propria persona. There was no appearance made by Respondent-Defendant WORKERS' COMPENSATION APPEALS BOARD.

APPENDIX B2

After full consideration of the evidence, points and authorities and oral arguments submitted by all parties,

IT IS HEREBY ORDERED that the Motion to Dismiss under Rule 12(b) be, and the same is hereby, granted; the Petition-Complaint is dismissed.

IT IS FURTHER ORDERED that the Motion for Sanctions under Rule 11 be, and the same is hereby denied, despite that the Court finds that the claims raised by the Petitioner are warrantless, meritless, frivolous, and without factual or legal foundation. Consequently, if Petitioner ever raises said claims again before this court monetary sanctions shall be assessed.

Dated 8/24/89

ROBERT C. BONNER

United States District Judge

APPENDIX B3

(2)
No. 89-1519

In the Supreme Court of the
United States

October Term, 1989

ALAN WINTERBOURNE,

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v.

WORKERS COMPENSATION APPEALS BOARD,
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COLLEGE DISTRICT,
AND ILA WINTERBOURNE,

Respondents.

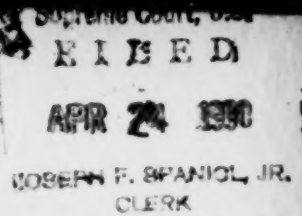
ON PETITION FOR WRIT OF CERTIORARI
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APPEAL NINTH CIRCUIT

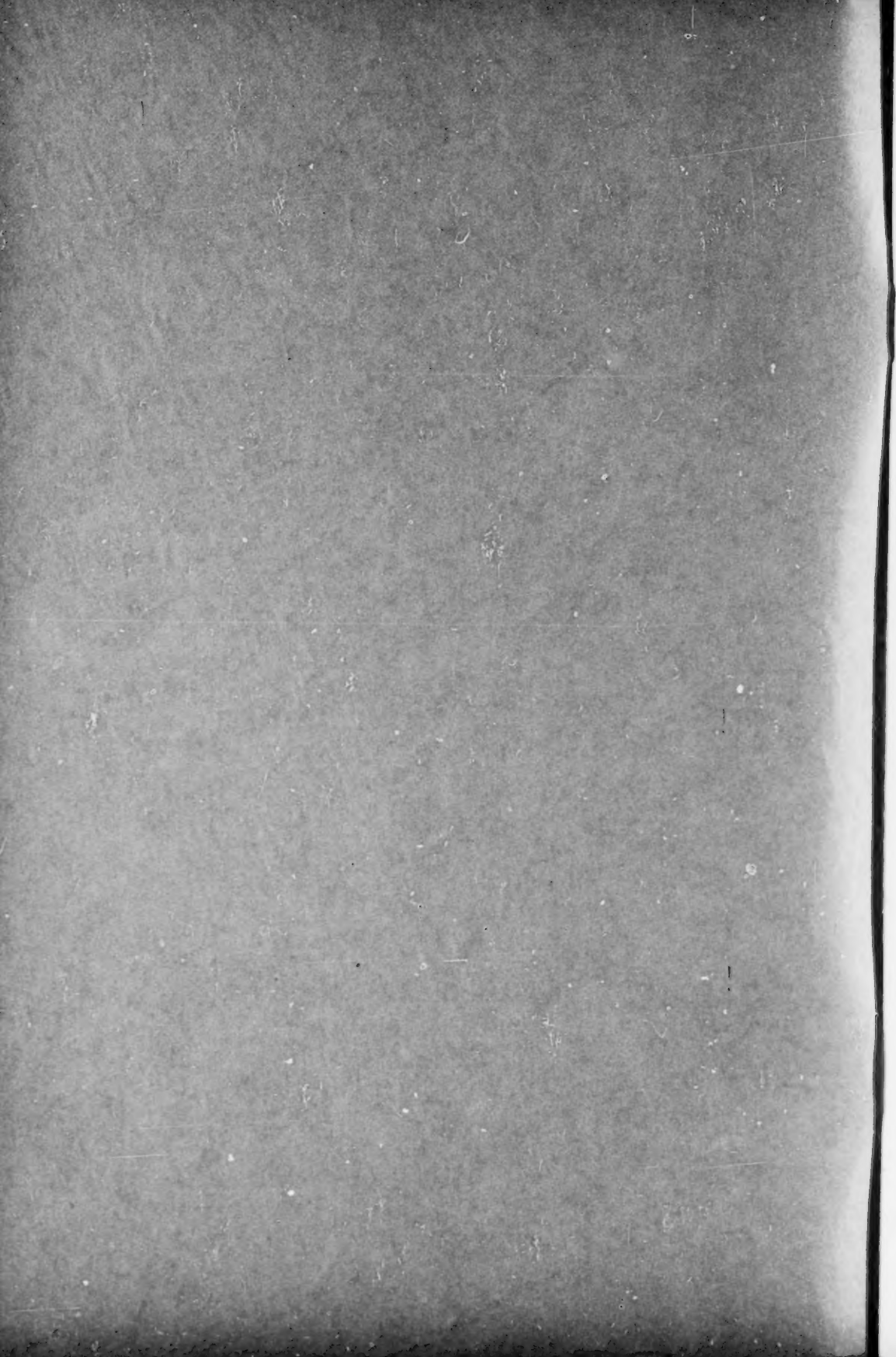
**BRIEF FOR RESPONDENTS
VENTURA COUNTY
COMMUNITY COLLEGE DISTRICT
AND ILA WINTERBOURNE**

GRANCELL, LEOVITZ, STANDER, MARX & GREENBERG
6701 Center Drive West, Twelfth Floor
Los Angeles, California 90045
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Attorney for Respondent
VENTURA COLLEGE COMMUNITY COLLEGE DISTRICT

BEST AVAILABLE COPY





QUESTIONS PRESENTED

1. Is a petition for writ of certiorari, which questions the validity of a State statute and claims rights under the Constitution, jurisdictionally out of time where it is filed more than one year after the judgment of the highest court of a State and more than ninety days after the judgment of a Federal Circuit Court of Appeal dismissing the appeal for lack of jurisdiction?

2. Are the Workers' Compensation Laws of California, which require that all persons who might be considered dependents in a death case to be joined as parties and which provide that an employer's liability for compensation shall be in lieu of all other liability, unconstitutional and inconsistent with due process of law?



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AND ILA WINTERBOURNE,

Respondents.

**BRIEF FOR RESPONDENTS
VENTURA COUNTY
COMMUNITY COLLEGE DISTRICT
AND ILA WINTERBOURNE**

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a

statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

8 Cal. Admin. Code Section 10360

Except as otherwise specifically provided in Rule 10372, any applicant other than the injured employee shall join the injured employee as a party. In such instances the Application for Adjudication shall include the injured employee's address if known or, if not known, a statement of such fact.

8 Cal. Admin Code Section 10364

Any person in whom any right to relief is alleged to exist may appear, or be joined, as an applicant in any case or controversy before the Workers' Comp-

sation Appeals Board.

8 Cal. Admin. Code Section 10372

In death cases, all persons who may be dependents shall either join or be joined as applicants so that the entire liability of the employer or the insurer may be determined in one proceeding.

8 Cal. Admin. Code Section 10380

The Appeals Board or a workers' compensation judge may order the joinder of additional parties necessary for the full adjudication of the case. A party not present or represented at the time of joinder shall be served with copies of the order of joinder, the application, minutes of hearing and summary of evidence, medical reports and other documents, as directed in the order of joinder. The Workers' Compensation Appeals Board may designate the party or parties who are to make service.

8 Cal. Admin. Code Section 10882

The Workers' Compensation Appeals Board shall inquire into the adequacy of all compromise and release agreements and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved, or issue findings and awards.

California Labor Code Section 133

The Division of Industrial Accidents, including the administrative director and the appeals board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.

California Labor Code Section 3502

In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee.

California Labor Code Section 3600(a)

Provides, in pertinent part:

Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the . . . conditions of compensation concur.

California Labor Code Section 3602(a)

Provides, in pertinent part:

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

California Labor Code Section 4701

When an injury causes death, either with or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for all of the following:

(a) Reasonable expenses of the employee's burial, not exceeding two thousand dollars (\$2,000) and for injuries occurring on and after January 1, 1991, not exceeding five thousand dollars (\$5,000).

(b) A death benefit, to be allowed to the dependents when the employee leaves any person dependent upon him or her for support.

California Labor Code Section 4702

Provides, in pertinent part:

(a) Except as otherwise provided in this section and Sections 4553, 4554, 4557, and 4558, the death benefit in cases of total dependency, when added to all accrued disability indemnity, shall be as follows:

(1) In the case of two or more total dependents and regardless of the number of partial dependents, ninety-five thousand dollars (\$95,000), or for injuries occurring on and after January 1, 1991, one hundred fifteen thousand dollars (\$115,000).

(2) In the case of one total dependent and one or more partial dependents, seventy thousand dollars (\$70,000), or for injuries occurring on and after January 1, 1991, ninety-five thousand dollars (\$95,000), plus four times the amount annually devoted to the support of the partial dependents, but not more than

a total of ninety-five thousand dollars (\$95,000), or for injuries occurring on and after January 1, 1991, one hundred fifteen thousand dollars (\$115,000).

(3) In the case of one total dependent and no partial dependents, seventy thousand dollars (\$70,000), or for injuries occurring on and after January 1, 1991, ninety-five thousand dollars (\$95,000).

(4) In the case of no total dependents and one or more partial dependents, four times the amount annually devoted to the support of the partial dependents, but not more than seventy thousand dollars (\$70,000), or for injuries occurring on and after January 1, 1991, a total of ninety-five thousand dollars (\$95,000).

California Labor Code Section 4703

Subject to the provisions of Section 4704, this section shall determine the right to a death benefit.

If there is any person wholly dependent for support upon a deceased employee, that person shall receive a full death benefit as set forth in Section 4702 for one total dependent, and any additional partial dependents shall receive a death benefit as set forth in subdivision (b) of Section 4702 to a maximum aggregate amount of twenty-five thousand dollars (\$25,000).

If there are two or more persons wholly dependent for support upon a deceased employee, those persons shall receive the death benefit set forth in subdivision (a) of Section 4702, and any person partially dependent shall receive no part thereof.

If there is more than one person wholly dependent

for support upon a deceased employee, the death benefit shall be divided equally among them.

If there is more than one person partially dependent for support upon a deceased employee, and no person wholly dependent for support, the amount allowed as a death benefit shall be divided among the persons so partially dependent in proportion to the relative extent of their dependency.

California Labor Code Section 5000

No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division, but nothing in this division shall:

(a) Impair the right of the parties interested to compromise, subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death.

(b) Confer upon the dependents of any injured employee any interest which the employee may not release by compromise or for which he, or his estate is in the event of such compromise by him accountable to dependents.

California Labor Code Section 5300

States, in pertinent part:

All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4.

(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

(b) For the enforcement against the employer

or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

California Labor Code Section 5301

The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division.

California Labor Code Section 5303

There is but one cause of action for each injury coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion of the appeals board, be joined in the same proceeding at any time; provided, however, that no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

California Labor Code Section 5307

The appeals board may by an order signed by four members:

(a) Adopt reasonable and proper rules of practice and procedure.

(b) Regulate and provide the manner in which, and by whom, minors and incompetent persons are to appear and be represented before it.

(c) Regulate and prescribe the kind and character of notices, where not specifically prescribed by this division, and the service thereof.

(d) Regulate and prescribe the nature and extent of the proofs and evidence.

No rule or regulation of the appeals board pursuant to this section shall be adopted, amended, or rescinded without public hearings. Any written request hereafter filed with the appeals board seeking a change in its rules or regulations shall be deemed to be denied if not set by the appeals board for public hearing to be held within six months of the date on which such request is received by the appeals board.

California Labor Code Section 5307.5(b)

The appeals board or a workers' compensation judge may:

Provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, or otherwise.

California Labor Code Section 5406

Except as provided in Section 5406.5, the period within which may be commenced proceedings for the collection of the benefits provided by Article 4 (commencing with

Section 4700) of Chapter 2 of Part 2 is one year from:

(a) The date of death where death occurs within one year from date of injury; or

(b) The date of last furnishing of any benefits under Chapter 2 (commencing with Section 4550) of Part 2, where death occurs more than one year from the date of injury; or

(c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury.

California Labor Code Section 5955

No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

Fourteenth Amendment to the United States Constitution, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States; and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XIV, Section 4 of the California Constitution

States, in pertinent part:

Sec. 4. The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and

management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character, all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

Federal Rule of Civil Procedure 19(a)

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party

objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Supreme Court Rule 20.2

A Petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

Supreme Court Rule 20.3

The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Supreme Court Rule 46.3

All papers and documents presented under this Rule shall be clearly legible and should, whenever possible, comply with Rule 39. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

STATEMENT

On August 7, 1984, Respondent, Ila Winterbourne, filed an Application for Adjudication of Claim (Death Case) pursuant to the Workers' Compensation Laws of California alleging that her husband, William Winterbourne, had died in the course and scope of his employment with Respondent, Ventura County Community College District (hereinafter referred to as "Respondent District"), leaving Ms. Winterbourne and the couple's two adult children, Carol Lockart and, Petitioner, Alan Winterbourne, as surviving dependents entitled to death benefits under the compensation laws.

Petitioner, Alan Winterbourne, appearing pro se, has filed a Petition for Writ of Certiorari in this Court, alleging, essentially, that his constitutional right to due process was denied when he was joined involuntarily in the death case filed by his mother. Petitioner, apparently, challenges the constitutionality of those State Laws which: (1) Required him to be joined in his mother's case. (2) Prohibit him from pursuing his own civil claim against Respondent District.

Under the workers' compensation laws of California, when an industrial injury causes death, the employer is liable to the employee's dependents for the employee's reasonable burial expenses and for a death benefit. California Labor Code Section 4701. (Hereinafter, all references are to the California Labor Code). The amount of the death benefit that qualified claimants are entitled to receive depends on whether the claimant was totally or partially dependent on the deceased employee. Labor Code Sections 4702, 4703.

Adult children of the deceased employee may qualify as dependents if they are supported in whole or in part by the employee. *Larson v. Industrial Accident Commission* (1950) 34 Cal.2d 772. However, whether a person is totally or partially dependent is, in all cases, a question of fact, Labor Code Section 3502, and dependents must establish proof of their dependency. *Atlantic Richfield v. Workers' Compensation Appeals Board* (1982) 31 Cal.3d 715.

To seek death benefits, the deceased employee's dependents, or their attorney or authorized representative, must file an application for adjudication of their claim. 8 Cal. Admin Code Section 10408. Applications for death benefits must be filed within one year of the date of death. Labor Code Section 5406. In death cases,

all persons who might be considered dependents should join or be joined as parties applicant, so that the entire liability of the employer may be determined in one proceeding. 8 *Cal. Admin. Code* Section 10372.

The California Labor Code also recognizes the right of parties to a compensation proceeding or claim to compromise any alleged liability arising thereunder. Labor Code Section 5000(a). The Workers' Compensation Appeals Board (hereinafter referred to as the "WCAB") must inquire into the adequacy of the "Compromise and Release Agreement" and may set the matter for a hearing and take evidence when necessary to determine whether the agreement should be approved or disapproved. 8 *Cal. Admin. Code* Section 10882. Approval of a Compromise and Release Agreement effectively terminates the liability of the employer or his insurance carrier to the extent indicated by the agreement. Labor Code Section 5000.

In the underlying case, the parties reached a verbal agreement for a Compromise and Release of all issues for \$50,000.00. On March 6, 1987, the County sent Ila Winterbourne the settlement documents. Signature pages were provided for each of the three alleged dependents. On April 10, 1987, Ila Winterbourne's attorney advised that Petitioner was unwilling to sign. Ila Winterbourne then sent a "Notice of Nonparticipation" dated April 13, 1987.

A Joint Petition for order Finding Claim of Alan Winterbourne Barred by Statute of Limitations was filed on June 8, 1987. On September 19 1987, the Joint Petition was set for Conference. At the time the Workers' Compensation Judge (hereinafter referred to as the "WCJ") took the opportunity to explain to Petitioner the adverse effects his nonparticipation would have on

his potential right for benefits. The WCJ advised petitioner that he should seek the advise of counsel. Petitioner confirmed that he had consulted with various attorneys but alleged that they were discriminating against him for financial reasons.

The Compromise and Release was submitted along with Respondent District's County's Motion to exclude Alan Winterbourne. On October 6, 1987 the WCJ issued his Notice of Intention to Approve Compromise and Release and to Grant Defendant's Motion to Exclude Alan Winterbourne. The Petitioner sought Reconsideration by the WCAB.

On November 17, 1987, reconsideration was granted. In the Opinion and Order Granting Reconsideration, the WCAB concluded:

"If Defendant, decedent's widow or decedent's daughter wish to fully and finally resolve this matter, they must join Petitioner either as a party applicant or party dependent." (Citing California Administrative Code, Title 8, Section 10364, 10365, 10372.)

On January 15, 1988, the WCJ issued an Order Joining Party Applicant, Alan Winterbourne. Petitioner responded with a Motion to be Unjoined.

The matter was returned to the trial level regarding reasonableness of the Compromise and Release. The WCJ advised Petitioner that this was the time and place of trial. Petitioner again asserted his desire not to participate and his objection to being joined.

On June 3, 1988, the WCJ issued his Order Approving Compromise and Release. Petitioner again sought Reconsideration.

The WCAB, in its Opinion and Order Denying Reconsideration dated June 20, 1988, held that, because Petitioner failed to carry his burden of establishing dependency, although an opportunity to be heard was provided, his rights were fully and properly resolved by the Order Approving Compromise and Release. The WCAB addressed Petitioner's objection to his joinder by pointing out that Section 10372 mandates that: "All persons who may be dependent shall either join or be joined as applicants so that the entire liability of the employer or insurer may be determined in one proceeding."

SUMMARY OF PROCEDURAL HISTORY

The Petitioner sought review of the Board's Order and Decision in the California Court of Appeal. His Petition for Writ of Review was denied without opinion on January 25, 1989.

Petitioner sought review in the California Supreme Court. His Petition for Writ of Review was denied without opinion on March 15, 1989.

On March 30, 1989 the Petitioner filed a "Petition for Writ of Review/Complaint for Transfer/Petition to be Unjoined" in the United States District Court for the Central District of California. Respondent filed a Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Procedure on the grounds that the District Court lacked jurisdiction over the subject matter of the Petition-Complaint. On August 24, 1989 the District Court issued an Order Granting Respondent's Motion to Dismiss.

The Petitioner filed a Notice of Appeal of the Order of Dismissal in the Ninth Circuit Court of Appeal on September 12, 1989. The Respondent District filed a Motion to Dismiss on the grounds that the Court did

not have jurisdiction over the subject matter of the appeal. On December 23, 1989 the Circuit Court of Appeal, referencing Labor Code Section 5955, dismissed Petitioner's appeal for lack of jurisdiction.

On or about April 9, 1990 Respondent District received Notice pursuant to Rule 12.1 that Petitioner's Writ of Certiorari had been filed in this Court on April 3, 1990.

REASONS FOR DENYING THE PETITION

1. The Petition, filed more than a year after the judgment of the California Supreme Court and more than ninety days after the judgment of the Ninth Circuit Court of Appeal, is jurisdictionally out of time.

Petitioner claims jurisdiction under Title 28 U.S.C. Section 1331, "constitutional amendments 1, 4, 5, 14," and Federal Rule of Civil Procedure 19(a) "on the joining of an involuntary plaintiff."

FRCP 19(a) applies to parties to an original action in Federal District Court and has been misapplied by Petitioner, presumably, because he believes this rule has some bearing on his arguments against being joined in the State Workers' Compensation Proceeding. It does not, in any case, confer jurisdiction on this, or any other, Court.

Similarly, while Petitioner may claim that his rights under Constitutional Amendments One, Four, Five and Fourteen have been abridged, these Amendments do not, in and of themselves, confer jurisdiction on this Court.

28 U.S.C. Section 1331 provides that Federal District Courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." But the Federal District Court did not have "original" jurisdiction in this matter. The California Workers' Compensation Appeals Board had original jurisdiction. Labor Code Sections 5300, 5301.

The substance of Respondent District's arguments for dismissal for lack of jurisdiction before the Central District Court of California and the Ninth Circuit Court of Appeals rested on the facts that: (1) Under Labor Code Section 5955, no court, other than the California Supreme Court and Courts of Appeal, had jurisdiction to review an order of the WCAB, and; (2) Petitioner should have petitioned this Court for writ of certiorari pursuant to 28 U.S.C. Section 1257 following the California Supreme Court's denial of Petitioner's writ of review on March 15, 1989.

28 U.S.C. Section 1257, which provides for review by this Court on writ of certiorari from "final judgments or decrees by the highest court of a State . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, or where any title, right, privilege, or immunity is . . . claimed under the Constitution . . .", would have properly conferred jurisdiction on this Court were it not for the fact the Petitioner's Writ of Certiorari is jurisdictionally out of time.

Pursuant to Supreme Court Rule 20.2 and 28 U.S.C. Section 2101(c), a petition for writ of certiorari in all cases other than the judgment in a criminal case shall be deemed in time when it is filed with the Clerk within ninety days of the applicable judgment or decree.

Supreme Court Rules 20.3 and 46.3 further provide that the Clerk will refuse to receive any petition for writ of certiorari which is "jurisdictionally out of time."

There are two possible applicable judgments or decrees in this matter: the California Supreme Court's denial of Petitioner's Writ of Review on March 15, 1989 and the Ninth Circuit Court of Appeal's dismissal of petitioner's appeal on December 23, 1989. Petitioner's Writ of Certiorari was filed April 3, 1990.

Respondent submits that, pursuant to 28 U.S.C. 1257 and Labor Code Section 5955, the California Supreme Court's decision is the applicable judgment and Petitioner's Writ of Certiorari is, therefore, obviously "jurisdictionally out of time." However, Petitioner's Writ of Certiorari was also filed more than ninety days after judgment of the Ninth Circuit Court of Appeals and is, therefore, jurisdictionally out of time whether the date of the judgment of the California Supreme Court or the date of the Ninth Circuit Court of Appeal is adjudged to be the time of the applicable judgment or decree.

2. Petitioner was not denied due process when he was involuntarily joined in the death case filed by his mother. Moreover, those laws which required him to be joined and prohibited him from pursuing his own civil claim are constitutional and reflect the lawful exercise of California's police powers.

The Workmen's Compensation Act of 1917 and Article XX, Section 21 of the California Constitution, adopted in 1918, provided California with a comprehensive workers' compensation system and full authorization for Legislative action relating thereto. The California Supreme Court declared that the general scheme of the Workers' Compensation Act was

constitutional, was a lawful exercise of the police power of the State, did not violate the "due process" and "equal protection" clauses of the Fourteenth Amendment of the United States Constitution, and, specifically, that the provisions allowing for death benefits were valid. *North Pacific S.S. Company v. Industrial Accident Commission of California* (1917) 174 Cal. 500; *Western Indemnity Company v. Pillsbury* (1915) 170 Cal. 686. Furthermore, when Article XX, Section 21 was repealed in 1976 and replaced by Article XIV, Section 4, which was identical in text to the former Article, the Supreme Court explained that the purpose of Article XIV, Section 4 was to remove any doubt as to the constitutionality of existing workers compensation legislation. *City and County of San Francisco v. Workers Compensation Appeals Board* (1978) 22 Cal.3d 103.

In *Great Western Power Company of California v. Industrial Accident Commission of California* (1925) 196 Cal. 593, 603, the Supreme Court explained that, since the Workers Compensation Act of 1917 provided that there should be but one cause of action for each transaction coming within the Act, all claims brought for death benefits, "... or any other matter arising out of such transaction may, in the discretion of the commission, be joined in the proceeding at the time." The Court saw no reason why the Legislature may not have intended to provide, "... that when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject of the controversy including further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination . . ."

These principles were codified in California Labor Code Sections 5303 and 5307.5(b) which provide for the joinder in the same proceeding of all parties interested therein at the discretion of the Workers' Compensation Appeals Board. These same principles have been adopted by the Appeals Board, under the administrative authority granted to the Board by Labor Code Sections 133 and 5307, and incorporated in 8 *Admin. Code* Sections 10360, 10364, 10380, and 10372; the rule relied upon by the Appeals Board in the underlying action to join petitioner so that the case could be fully adjudicated.

In Labor Code Sections 3600 et. seq., the Legislature codified another basic principle of the California worker's compensation system: that an employer's liability for compensation shall be "in lieu of an other liability whatsoever to any person . . . without regard to negligence," (Labor Code Section 3600(a)), and the right to recover such compensation shall be "the sole and exclusive remedy of the employee or his or her dependents against the employer . . ." Labor Code Section 3602(a).

In 1917, at the time California was overhauling its compensation scheme, this Court ruled that similar compensation schemes which, in lieu of the common law liability confined to cases of negligence, imposed a liability upon employers to make compensation for disabling or fatal accidental injuries received by employees in the course of their employment, did not contravene the Fourteenth Amendment as being inconsistent with due process of law, but were a valid exercise of the police power of the states. *Mountain Timber Company v. State of Washington* (1917) 243 U.S. 219; *Hawkins v. Bleakly* (1917) 243 U.S. 210; *New York Central Railroad Company v. White* (1917) 243

U.S. 188. Specifically, in *Madera Sugar Pine Company v. Industrial Accident Commission of California* (1923) 262 U.S. 499, this Court held, on appeal from a decision of the California Supreme Court, that California's Workmen's Compensation Act, providing for the liability of the employer to make compensation for injuries by an employee, irrespective of the question of negligence, was constitutional as a valid exercise of the State's police powers.

Furthermore, in *Hawkins v. Bleakly, supra.*, this Court declared that similar compensation schemes were not in contravention of the Fourteenth Amendment as clothing an administrative body with an arbitrary discretion inconsistent with due process of law, where the Act established administrative machinery for applying the statutory measure to the facts of each particular case, and provided for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions.

Pursuant to the constitutional and statutory provisions of California, and the California Supreme Court decisions and the rulings of this Court interpreting the constitutionality of those provisions, it is clear that Petitioner was not denied due process when he was involuntarily joined in the death case filed by his mother. It is equally clear that those laws which required him to be joined and prohibited him from pursuing his own civil claim against Respondent District are constitutional, and reflect the lawful exercise of California's police power.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GRANCELL, LEOVITZ, STANDER,

MARX & GREENBERG

MARK J. BATT

6701 Center Drive West, Twelfth Floor

Los Angeles, California 90045

Counsel for Respondent

VENTURA COUNTY COMMUNITY

COLLEGE DISTRICT

GOLDSCHMID, SILVER & SPINDEL

STEVEN SPINDEL

3660 Wilshire Boulevard, Suite 638

Los Angeles, California 90010

Counsel for Respondent

ILA WINTERBOURNE

APPENDIX



STATE OF CALIFORNIA
COMPROMISE AND RELEASE (Dependency Claim)

CASE NO. 84 VE 47950

SOCIAL SECURITY NO. 524-16-6344

WILLIAM WINTERBOURNE

VS. APPLICANT

Ventura County Community College District, PSI

CORRECT NAME OF EMPLOYER

c/o Jardine Claims Management, Inc.

CORRECT NAME OF INSURANCE CARRIER

682 Milton Avenue,
Ventura, CA. 93003

ADDRESS

71 Day Road, Ventura,
California 93003

ADDRESS

P.O. Box 19610,
Irvine, California 92712

ADDRESS

The parties hereto, for the purpose of compromise only, agree as follows:

1. The above-named applicants claim_____ that WILLIAM WINTERBOURNE while employed at Ventura, California on 1952 through 7/11/84 by Ventura County Community College District, then insured as to workers' compensation liability by permissibly self insured sustained injury arising out of and in the course of such employment as follows: suicide allegedly resulting from emotional stress and strain of employment
2. The death of said employee occurred on July 12, 1984, as a result of the claimed injury.
3. The actual weekly wages of the employee at the time of claimed injury were in dispute, while average weekly wages (statutory) were in dispute.
4. Payments of compensation to the employee in his lifetime on account of the claimed injury were None

5. The applicants herein claim_____ to have been dependent upon said employee at the time of claimed injury, and state_____ the names, ages, relationship to, and the extent of dependency upon said deceased employee to have been as follows:

NAME	AGE	RELATIONSHIP	EXTENT OF DEPENDENT
Ila Winterbourne		Wife	in dispute
Alan D. Winterbourne	3/7/60	Son	in dispute
Carol Lockhart	7/26/56	Daughter	in dispute

6. The parties hereby agree to settle any and all claims of said dependents on account of the claimed injury and the death of said employee by payment of the sum of \$50,000.00, payable as follows to _____

SEE ADDENDUM "A"

7. The parties hereby agree (if such items of expenses be claimed) that medical, hospital and burial expense required by reason of the alleged injury and the death of the employee shall be borne as follows: ALL BY APPLICANTS/DEPENDENTS;

*Defendents agree to adjust or litigate David Harvey, M.D. \$700.00 and hold Applic harmless for industrial portions.

NONE BY EMPLOYER/DEFENDANTS; except for the medical/legal bill of Alfred Bloch M.D. (\$1,280.00) which has or will be paid by Defendant.

8. The name and address of applicant's attorney (if any): Goldschmid, Silver & Spindel, 3660 Wilshire Boulevard, \$638, Los Angeles, California 90010 who requests a fee of \$7,000.00, having been previously paid \$ _____.

9. Reason for compromise See Addendum "B" Blue Cross has agreed to accept \$2,522.00 in full

satisfaction of its lien. *Applicants to be held harmless regarding any liability that may exist regarding lien of Blue Cross, with regard to industrial portions.

10. The undersigned request that this compromise agreement and release be approved.
11. Upon approval of this compromise agreement as provided by law, and payment in accordance with the provisions of said order of approval, said applicants and each of them do hereby release and forever discharge said employer and said insurance company of and from all claims, demands, actions or causes of action, of every kind or nature whatsoever, on account of, or by reason of the injury and death sustained as aforesaid by the employee, and in particular of any, all and every claim or cause of action which the undersigned, heirs, executors, representatives, or administrators may have had, now have, or shall hereafter have against said employer, said insurance carrier, and each of them under Division IV of Labor Code of the State of California.
12. It is agreed by all parties hereto that the filing of this document is the filing of an application on behalf of the applicant____, and that it may be set for hearing as a regular application, reserving to the parties the right to put in issue any of the facts admitted herein, and that if hearing is held with this document used as an application the defendants shall have available to them all defenses that were available as of the date of filing of this document, and that it may thereafter be approved, disapproved, or a decision issued after a hearing has been held and the matter regularly submitted.

13. For the purpose of determining the lien claim filed herein for the unemployment compensation disability and/or unemployment compensation benefits which have been paid under or pursuant to the California Unemployment Insurance Code, the parties propose the following division of the sum agreed upon for settlement and release of this case:

\$_____ for temporary disability covering the period _____ to _____

\$_____ for accrued medical expense paid or incurred by the employee.

\$_____ for future medical care.

\$_____ for permanent disability.

(The above segregation must be fair and reasonable and must be based on the real facts of the case. There should be no attempt made to deprive the lien claimant of a reasonable recovery consistent with all the amounts involved.)

Witness the signature herof the 24 day of April 1987 at Ventura, Ca.

[Signature]
GRACIELA SILVER & SPTHEL
 BY: LAWRENCE SILVER

STATE OF CALIFORNIA
Ventura County of Ventura }
 On this 24 day of April A.D. 1987, before me, Dorothy T. Albrecht
 a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared
GRACIELA SILVER & SPTHEL

known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same
 In Witness Whereof I have hereunto set my hand and official seal the day and year in this Certificate first above written

[Signature]
Colonel J. Mucante
 Notary Public in and for the said County and State of California

By Notarization Exp. Feb. 2, 1988

8. The name and address of applicant's attorney (if any): Goldschmid, Silver & Spindel, 3660 Wilshire Boulevard, \$638, Los Angeles, California 90010 who requests a fee of \$7,000.00, having been previously paid \$ _____
9. Reason for compromise See Addendum "B" Blue Cross has agreed to accept \$2,522.00 in full satisfaction of its lien. *Applicants to be held harmless regarding any liability that may exist regarding lien of Blue Cross, with regard to industrial portions.
10. The undersigned request that this compromise agreement and release be approved.
11. Upon approval of this compromise agreement as provided by law, and payment in accordance with the provisions of said order of approval, said applicants and each of them do hereby release and forever discharge said employer and said insurance company of and from all claims, demands, actions or causes of action, of every kind or nature whatsoever, on account of, or by reason of the injury and death sustained as aforesaid by the employee, and in particular of any, all and every claim or cause of action which the undersigned, heirs, executors, representatives, or administrators may have had, now have, or shall hereafter have against said employer, said insurance carrier, and each of them under Division IV of Labor Code of the State of California.
12. It is agreed by all parties hereto that the filing of this document is the filing of an application on behalf of the applicant____, and that it may be set for hearing as a regular application, reserving to the parties the right to put in issue any of the facts

admitted herein, and that if hearing is held with this document used as an application the defendants shall have available to them all defenses that were available as of the date of filing of this document, and that it may thereafter be approved, disapproved, or a decision issued after a hearing has been held and the matter regularly submitted.

13. For the purpose of determining the lien filed herein for the unemployment compensation disability and/or unemployment compensation benefits which have been paid under or pursuant to the California Unemployment Insurance Code, the parties propose the following division of the sum agreed upon for settlement and release of this case:

\$_____ for temporary disability covering
the period _____ to _____

\$_____ for accrued medical expense paid or incurred by the employee.

\$_____for future medical care.

\$_____for permanent disability.

(The above segregation must be fair and reasonable and must be based on the real facts of the case. There should be no attempt made to deprive the lien claimant of a reasonable recovery consistent with all the amounts involved.)

Witness the signature hereof this 8 day of April, 1882 at Wichita

DATE: 10/27/67
BY: LAWRENCE SILVER
GRANVILLE, GRAMMELL AND MARSHALL
STATE OF CALIFORNIA

I, W. H. Wells, County of Jefferson
On this 8th day of April AD 1982, before me, Robert T. Albee, Jr.
a Notary Public in and for the said County and State, residing therein, duly convened, read and were personally approved

[illegible]Robert J. Thacker

ADDENDUM "A"

PARAGRAPH 6:

a) \$50,000 payable to Ila Winterbourne

Ila Winterbourne
Ila Winterbourne
SS#: 522-36-4626

b) Carol Lockart hereby waives her rights to any settlement herein.

Carol Lockart
Carol Lockart
SS#: 551-17-5235

c) Alleged partial dependent Alan Winterbourne has strenuously asserted his non-participation in either this action or its settlement. See Exhibit A.

Despite Mr. Winterbourne's non-participation, the parties wish to enter a settlement which will include the rights of all potential dependents and resolve all potential liability on the part of Defendant arising from the death of William Winterbourne. Defendant refuses to enter this Compromise and Release unless the Order Approving the Compromise and Release disposes of all potential claims against Defendant (whether or not specified) by all potential dependents. Thus, the parties agree that any Order approving the Compromise and Release will be contingent upon a further Order that all potential claims by dependents not specifically enumerated in the settlement will be thereafter barred.

Further, it is the agreed intention of the parties to exclude Alan Winterbourne from this settlement and the parties request a specific finding that any and all potential claims by Mr. Winterbourne against the Defendant are hereby deemed resolved by this settlement; future claims will be barred.

Addendum "A"

Page Two

those now disclosed, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived. Section 1542 of the Civil Code of California reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

In further consideration of the payment of the aforesaid sum, Applicant agrees that this release extends to and covers the executors, administrators, heirs, representative, successors, assigns officers, directors, agents, servants, and employees of the defendants and each of them, and the physicians, surgeons, and nurses of the defendants, and each of them, whether acting individually on or behalf of them, or either of them.

DATED: 4/7/87


ILA WINTERBOURNE

DATED: 4/8/87

DATED: 4/14/87

✓ Carol Lockart
CAROL LOCKART

Lawrence Silver
GOLDSCHMID, SILVER & SPINDEL
BY: LAWRENCE SILVER

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

WILLIAM WINTERBOURNE

(Deceased),

ILA WINTERBOURNE

(Widow),

Applicant

VS.

VENTURA COUNTY
COMMUNITY COLLEGE
DISTRICT; Permissibly
Self-Insured; GATES,
McDONALD &
COMPANY, Adjusting
Agent,

Defendant

Case No. 84 VE 47950

OPINION

AND ORDER GRANTING
RECONSIDERATION
AND DECISION
AFTER
RECONSIDERATION

Petitioner, Alan Winterbourne, the allegedly dependent adult son of decedent, William Winterbourne, seeks reconsideration, in propria persona, of the Order Approving Compromise and Release issued by a workers' compensation judge (WCJ) on October 6, 1987. By that decision, the WCJ approved a proposed compromise and release agreement by which Ila Winterbourne, decedent's widow, agreed to settle all her claims against defendant for the gross sum of \$50,000.00; by which Carol Lockhart, decedent's daughter, agreed to waive all her claims against defendant; and by which the settling parties requested the issuance of an order which would provide that any and all potential claims against defendant by petitioner (who did not sign or

participate in the settlement agreement) would be deemed resolved and barred. In accordance with the settling parties' request, the WCJ's compromise and release order stated:

"It is specifically found that Alan Winterbourne has not intended to assert his claim for benefits as a potential dependent; however, his rights are herewith resolved. ANY FUTURE CLAIMS BY ALL DEPENDENTS ALLEGED HEREIN WILL BE BARRED BY THIS AGREEMENT"

Petitioner contends that a non-participating individual cannot be barred from something he or she did not participate in.

A compromise and release agreement may only settle the rights of those parties who sign it. Thus, since petitioner has elected not to be a party to the instant agreement, the agreement cannot determine his rights. Moreover, because the compromise and release agreement was clearly conditioned upon the disposal of any potential claim by petitioner, and because the Appeals Board may not rewrite the parties' bargained for agreement by approving it without disposing petitioner's rights, the compromise and release approval order must be rescinded. (See, Burbank Studios v. WCAB (Yount) (1982) 134 Cal.App.3d 929, 47 CCC 832, 837; State Compensation Ins. Fund v. WCAB (Adame) (1983) 148 Cal.App.3d 649, 48 CCC 852, 853-854).

If defendant, decedent's widow, or decedent's daughter wish to fully and finally resolve this matter, they must join petitioner either as a party applicant or as a party defendant.¹ (See, Cal. Admin. Code, tit. 8, §§ 10364,

¹If petitioner meets its criteria, a guardian ad litem might be appointed for him under Labor Code section 5408.

10365). Indeed, this is the proper procedure in a death case. (See, Cal. Admin. Code, tit. 8, § 10373). We observe in passing that, because petitioner was listed under decedent's widow's application, there does not appear to be a statute of limitations problem, however, we leave it to the WCJ to decide this issue in the first instance.

For the foregoing reasons,

IT IS ORDERED that petitioner's Petition for Reconsideration, filed October 20, 1987, be, and it is hereby, GRANTED.

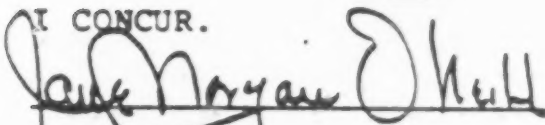
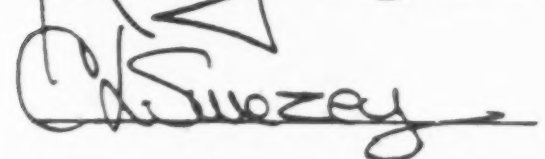
IT IS FURTHER ORDERED that the Order Approving Compromise and Release, issued by the workers' compensation judge on October 6, 1987, be, and it is hereby, RESCINDED.

IT IS FURTHER ORDERED that this matter be returned to the workers' compensation judge for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

 DEPUTY

I CONCUR.



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
DEC 1 1987
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN SEAL
ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS
WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

WILLIAM B. WINTERBOURNE
(Deceased),

ILA WINTERBOURNE (Widow),
ALAN WINTERBOURNE
(Adult Dependent),

Applicant

vs.

VENTURA COUNTY
COMMUNITY
COLLEGE DISTRICT;
PERMISSIBLY SELF-
INSURED,

Defendants

Case No.

84 VE 47950

Order Joining

Party APPLICANT

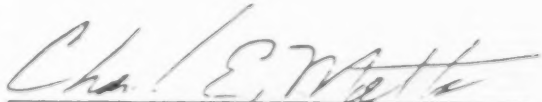
(WCAB Rule 10372)

Good Cause Appearing

IT IS ORDERED THAT ALAN D. WINTERBOURNE

(see Application filed 8-8-84, par. 8)

is joined as a party applicant herein in Case No. 84
VE 47950.



WORKERS' COMPENSATION APPEALS BOARD
JUDGE CHARLES E. MATTSO

Dated JAN 15 1986

Service by mail on parties as shown on Official
Address Record effected on above date.

By: Ella Carrion

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

WILLIAM WINTERBOURNE,
(DEC)
ILA WINTERBOURNE,
(WIDOW)

Applicant

vs.

VENTURA CO. COMMUNITY
COLLEGE DISTRICT,
PSI, GATES, MCDONALD
AND COMPANY

Defendants

Case No. 84 VE 47950

**Order Approving
Compromise and Release
(DEPENDENCY CLAIM)**

From a review of the records as a whole, and considering all factors, the Compromise and Release appears fair and adequate and should be approved. The reason for terms of the settlement, as set forth in the agreement, are adopted by this reference.

This settlement shall settle all claims of the Applicant against Defendant, including but not limited to, claims under the Labor Code § 132a and § 4553, and claims for all injuries whether or not specified.

This settlement shall include any and all claims (whether or not specified) by any and all potential dependents. It is specifically contingent upon a binding Order excluding Alan Winterbourne from this settlement.

The parties to the above-entitled action having filed a Compromise and Release herein, on 9-18-87 settling this case for \$50,000.00 in addition to all sums which may have been paid previously, and requesting that it be

approved; and this Board having considered the entire record, including said Compromise and Release, now finds that it should be approved.

IT IS ORDERED that said Compromise and Release be approved.

Award is made in favor of:

Ila Winterbourne (Widow) \$43,000.00

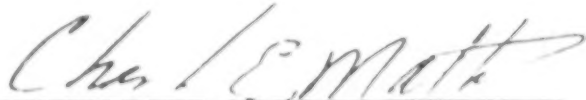
Less attorney's fees to:

Goldschmid, Silver & Spindel 7,000.00

(The one remaining applicant/dependent has waived her rights to any settlement herein)

TOTAL \$50,000.00

All medical hospital and burial expenses are the sole responsibility of Applicant/Dependent; except that Defendant will pay Alfred Bloch, M.D. \$1,280.00, Blue Cross agrees to accept \$2,522.00 in full satisfaction of its lien claim, defendant to pay or adjust Dr. Harvey \$700 and Sak Photocopy \$412.38. It is specifically found that Alan Winterbourne has not intended to assert his claim for benefits as a potential dependent; however, his rights are herewith resolved. ANY FUTURE CLAIMS BY ALL DEPENDENTS OF RECORD WILL BE BARRED BY THIS ORDER.



WORKERS COMPENSATION JUDGE
CHARLES E. MATTSOON

Dated JUN 3 1988

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS

Service by mail on parties as shown on
Official Address Record effected on above date

BY Ellen Carrin

WILLIAM WINTERBOURNE

(Deceased),

ILA WINTERBOURNE

(Widow),

Applicant

V.S.

VENTURA COUNTY
COMMUNITY COLLEGE
DISTRICT; Permissibly
Self-Insured; GATES,
McDONALD &
COMPANY, Adjusting
Agent,

Defendant

CASE No. 84 VE 47950

OPINION AND ORDER
DENYING
RECONSIDERATION

Petitioner, Alan Winterbourne, the allegedly dependent adult son of decedent, William Winterbourne, seeks reconsideration, in propria persona, of the Order Approving Compromise and Release issued by a workers' compensation judge (WCJ) on June 3, 1988. By that decision, the WCJ approved a proposed compromise and release agreement by which Ila Winterbourne, decedent's widow, agreed to settle her claim against defendant for the gross sum of \$50,000.00; by which Carol Lockhart, decedent's daughter, agreed to waive her claim against defendant; and by which the settling parties requested the issuance of an order which would provide that any and all potential claims against defendant by petitioner (who did not sign or participate in the settlement agreement) would be deemed resolved

and barred. In accordance with the settling parties' request, the WCJ's compromise and release order stated:

"It is specifically found that Alan Winterbourne has not intended to assert his claim for benefits as a potential dependent; however, his rights are herewith resolved. ANY FUTURE CLAIMS BY ALL DEPENDENTS ALLEGED HEREIN WILL BE BARRED BY THIS ORDER."

M. LUDINGTC

AUG 09 1987

Petitioner contends that a compromise and release agreement cannot determine the rights of a party who has not signed it, or who has not elected to be a party to it.

By an Opinion and Order Granting Reconsideration and Decision After Reconsideration which issued on December 11, 1987, we returned this matter to the WCJ and noted that if defendant, decedent's widow, or decedent's daughter wished to fully and finally resolve this matter, they must join petitioner as a party applicant. (See, Cal. Code Regs., tit. 8, § 10372; see, also, §§ 10364, 10365, 10380).

On January 15, 1988, petitioner was ordered joined as a party applicant, and both the endorsed recital to the joinder order and the Board's official address record reflect that the order was properly served on him. (See, Cal. Code Regs. tit. 8, §§ 10520, 10380).¹

On January 28, 1988, this matter was set for trial on March 17, 1988. This notice of hearing was also

¹Petitioner's February 3, 1988 letter to the WCJ, objecting to his joinder, also establishes that he was served.

properly served on petitioner. (See, Cal. Code Regs., tit. 8, §§ 10520, 105208).

On March 18, 1988, this matter came on for trial. Petitioner appeared at the hearing, unrepresented by counsel. Yet, although petitioner had the burden at trial of proving that he was decedent's dependent (Lab. Code, §§ 5705, 3502; Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu) (1982) 31 Cal.3d 715, 720, 47 Cal. Comp. Cases 500, 502; Spreckles Sugar Co. v. Industrial Acc. Com. (Gamblin) (1921) 186 Cal. 256, 258, 8 I.A.C. 136, 137), and although he had the opportunity at the hearing to present evidence on that issue (see, Lab. Code, §§ 5700, 5701, 5702; Cal. Code Regs., tit. 8, §§ 10541, 10548), he failed to come forward with any evidence. Thus, petitioner has not carried his burden of establishing his alleged dependency, and his petition for reconsideration shall therefore be denied: that is, because he has not proven that he was decedent's dependent, his rights were properly fully and finally resolved by the June 3, 1988 compromise and release approval order.²

For the foregoing reasons,

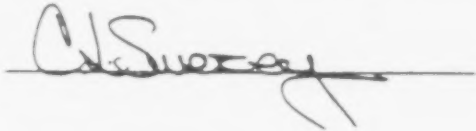
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²Although prior to the hearing, petitioner objected to his joinder as a party applicant, he has waived that objection by failing to raise it in his petition for reconsideration. (Lab. Code, §§ 5902, 5904; Cal. Code Regs., tit. 8, § 10842). In any event, in the case of an industrially-related death, Appeals Board Rule 10372 mandates that "all persons who may be dependents shall either join or be joined as applicants so that the entire liability of the employer or the insurer may be determined in one proceeding." (Cal. Code Regs., tit. 8, § 10372, emphasis added; see, also, §§ 10364, 10380). Thus, the WCJ's order of joinder was proper.

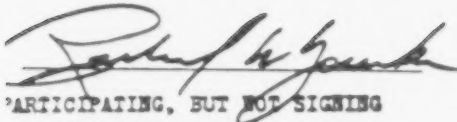
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IT IS ORDERED that petitioner's Petition for Reconsideration, filed June 20, 1988, be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD



I CONCUR.

 DEPUTY
PARTICIPATING, BUT NOT SIGNING

JANE AL O'NEILL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
JUL 26 1988
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN
ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS



OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 6

B036962

Grancell Grancell and Marshall
23622 Calabasas Rd.
Suite 349
Calabasas, CA 91302

RE: Winterbourne, Alan

VS.

Workers Compensation Appeals Board
Ventura County Community College Dist
2 Civil B036962
Ventura No. 84VE47950

PETITION FOR WRIT OF Review DENIED

RECEIVED
JAN 24 1984
GRANCEL & MARSHALL
23622 CALABASAS RD.
CALABASAS

**ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL**

2nd District, Division 6, No. B036962

S008879

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ALAN WINTERBOURNE, Petitioner,

v.

**WORKERS' COMPENSATION APPEALS BOARD
et al., Respondents.**

Petition for review DENIED.

SUPREME COURT
FILED

MAR 15 1989

Robert W. Marshall, Clerk

ELSON

LUCAS, J.

Chief Justice

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 24, 1990, I served the within *Brief of Respondents Ventura College Community College District and Ila Winterbourne* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(*By Express Mail: original
and forty copies*)

Workers' Compensation
Appeals Board
Legal Department
Post Office 6759
San Francisco, CA 94102
(Case No. 84 VE 47950)

Alan Winterbourne
684 Milton Avenue
Ventura, California 93003

Goldschmid, Silver and
Spindel
3660 Wilshire Boulevard
Suite 638
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 1990, at Los Angeles, California.

Betty J. Malloy
(*Original signed*)

